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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1091~~ 193

JAMES DAVIS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ of Certiorari To The Supreme Court of Illinois.

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Petition For Writ of Certiorari To The Supreme Court of Illinois.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, James Davis, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on January 24, 1957, which affirmed the judgment of conviction of the Circuit Court of Winnebago County of the crime of rape and sentence to the penitentiary for a term of 15 years.

Citation to Opinion Below.

The opinion of the Supreme Court of Illinois, printed in Appendix B hereto, infra, page 31, is reported in 10 Ill. 2d 430, 140 N.E. 2d 675.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on January 24, 1957. A timely petition for rehearing filed on February 8, 1957, was denied on March 19, 1957. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3) because a right was specially set up and claimed under the Constitution of the United States.

The federal question sought to be reviewed was raised in the motion for new trial in the court of first instance and in the assignments of errors and argument, and the petition for rehearing, in the appellate court. The question including every subsidiary question fairly comprised therein was overruled and it was held that petitioner had a fair trial.

Question Presented.

Whether the state deprived petitioner of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States because he did not have a fair trial.

Statute Involved.

The statutory provisions involved are Sections 18, 20, 21, 23, 24 and 25 of Chapter 146 of the Illinois Revised Statutes, 1955. They are printed in Appendix A, infra, page 29.

Statement of the Case.

This was a criminal prosecution.

Petitioner was indicted on January 9, 1956, in the Circuit Court of Winnebago County, for the crimes of forcible rape, statutory rape, and assault with intent to commit rape of a 14 year old girl on September 18, 1955.

He was arraigned on January 11, 1956, and furnished with a copy of the indictment, consisting of three counts, and a list of the jurors and witnesses. A motion to quash the indictment was heard and denied. He then entered a plea of not guilty. The case was set for trial on February 13, 1956. The required bail of $3,500 was furnished.

The case, however, was not reached on the trial list on the date set. On February 14, 1956, he filed a petition for change of venue. It alleged that he feared that he would not receive a fair and impartial trial if the cause was tried before the Honorable Albert S. O'Sullivan, or the Honorable William R. Dusher, two of the judges of said court, because said judges were prejudiced against him, so that he could not expect a fair trial by said judges. It also alleged that the cause for a change of venue arose and came to his knowledge theretofore and again on February 13, 1956. It was verified by his affidavit.

Notice was given to the State's Attorney before the petition was filed. He also was furnished with a copy of the petition.

Application was made to Judge Dusher but he was not able to consider it at that time. He set it for February 15, 1956, at 9:30 A.M., but he then assigned it to Judge O'Sullivan who it had been learned was scheduled to hear the case when it was reached on the trial list.

Petitioner appeared in person and by his attorney before Judge O'Sullivan at the time set. This was the first time that he had been before Judge O'Sullivan in this case.

The petition was presented to Judge O'Sullivan. It was considered by him. He said that he knew nothing about the case or the parties, but he was then advised that he had heard a case against petitioner several years ago. In it the jury disagreed. An application for a change of venue from both Judge O'Sullivan and Judge Dusher was granted at that time.

His attorney then remarked:

> "I understand your Honor is going to be here next month; Judge Dusher is not going to be here. I would say this, if the court would remove the case from the trial list at the present time and not pass on the petition, it could then be set for trial before you next month. I understand there is to be a jury."

Judge O'Sullivan, however, made no comment or remarks relative thereto, but he denied the petition because it was not filed in time. He then set the case for trial at 1:30 P.M.

Prior to the selection of the jury and the commencement of the trial, petitioner renewed his application for a change of venue. He then asked leave to file an affidavit.

It alleged that he believed that the Honorable Albert S. O'Sullivan and the Honorable William R. Dusher, two of the judges of said court, were so prejudiced against him that he could not have a fair and impartial trial by said judges. Leave to file the affidavit was denied.

The case was tried by a jury. Evidence was introduced by the People in support of the allegations of the indictment, including a purported statement of petitioner. Objection was made to the statement because it was involuntary, but it was admitted and read to the jury. The prosecuting witness, her mother and a sister testified relative to the identity of the person who committed the crime. Petitioner introduced evidence relative to his innocence of the crime. His defense of alibi was corroborated by three witnesses.

Motions for a directed verdict at the close of the People's case and all the evidence were denied.

A motion to compel an election between the counts of the indictment was reversed.

In his argument to the jury the State's Attorney used language tending to inflame and excite the minds of the jury against petitioner. He also used language tending to coerce the jury into a verdict of guilty.

Erroneous instructions tendered by the People, particularly Instructions Nos. 6, 19 and 28, were given to the jury.

In a single verdict the jury found petitioner guilty of rape in manner and form as charged in the first and second counts of the indictment and fixed his punishment at imprisonment in the penitentiary for a term of 15 years. No verdict, however, was returned as to the third count.

Motions for a new trial and in arrest of judgment were denied.

Petitioner, on March 15, 1956, was sentenced to the Illinois State Penitentiary. Mittimus, however, was stayed.

Petitioner then sued out a writ of error from the Supreme Court of Illinois to review the judgment of conviction and sentence. The writ of error was made a supersedeas and a bond of $10,000 was filed.

The judgment of the Supreme Court of Illinois was entered on January 24, 1957. A petition for rehearing was denied on March 19, 1957. On the following day the March term of court was adjourned. The mandate was issued on March 22, 1957.

A motion for stay of execution was filed on March 29, 1957, and an amended motion on April 3, 1957. It was sought in the amended motion to stay the execution of the judgment and the issuance of the mandate, and to recall the mandate theretofore issued, and to be admitted to bail. The amended motion was denied by the Honorable Charles H. Davis, a Judge of the court in vacation, because it was believed that the jurisdiction of the court ceased at the close of the term.

A motion to vacate the order entered on April 3, 1957, and for other relief was filed on May 2, 1957. It was denied by the court on May 14, 1957.

Reasons for Granting the Writ.

1. The refusal to grant a change of venue deprived petitioner of his Constitutional right to a fair and impartial trial.

In all criminal prosecutions, an accused has the right to a fair and impartial trial. To secure such right, he is entitled to make application for a change of venue.

The petition was filed in apt time. It was in form and in substance in compliance with the statute. It was verified by the affidavit of petitioner, but it was not accompanied by a separate affidavit stating that he believed that the two judges were so prejudiced against him that he could not have a fair and impartial trial by them.

The provisions of the statute which authorizes a change of venue upon conditions prescribed should receive a liberal, and not a strict construction. Such statute should be construed to promote, rather than defeat, the right to a change of venue, especially where the prejudice of the judge is alleged. (*People* v. *McWilliams*, 350 Ill. 628, *People* v. *Scott*, 320 Ill. 327.)

Inasmuch as the petition was verified by the affidavit of petitioner, an accompanying affidavit was not required. It would add nothing to that which was already set forth in the petition. If the cause, however, was the prejudice of the judges against the attorney representing him, then the accompanying affidavit of the attorney is required. If it was believed that the accompanying affidavit was required, the trial court should have given petitioner leave to file the affidavit. It was reversible error to deny the motion. (*People* v. *Dieckman*, 404 Ill. 161, *People* v. *Shiffman*, 350 Ill. 243.)

The application was made in good faith. Although the court below believed that the petition was filed for delay, this was not the reason that it was filed. Petitioner made the application because of the prejudice of the judges. The allegation was not made without foundation. An examination of the record clearly discloses the prejudice.

In addition, the alleged prejudice of the trial judge was not waived. Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights and they do not presume acquiescence in the loss of fundamental rights. To constitute a waiver there must be an intentional relinquishment of a legal right. (*Perin* v. *Parker*, 126 Ill. 201.) Petitioner had no intention to waive the alleged prejudice and he did not waive it because he renewed his application for a change of venue. It is a complete answer to the conclusion of the court below that the alleged prejudice was waived.

The right to a change of venue because of the prejudice of the judge or any two of them on compliance with the statute is absolute. It was the duty of the trial court to grant the change of venue. The denial constituted reversible error. (*People* v. *Rosenbaum*, 299 Ill. 93, *People* v. *Cohen*, 268 Ill. 416, *Cantwell* v. *People*, 138 Ill. 602.)

The trial court was without jurisdiction to conduct the trial. The subsequent proceedings before it were unauthorized. Petitioner did not have a fair and impartial trial. He was deprived of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

2. The purported complaint of the prosecuting witness to her mother was not admissible.

The prosecuting witness did not testify that she made complaint to anyone. Her mother, however, was asked to relate what her daughter told her on September 18, 1955. Objection was made by petitioner, but the trial court permitted her to answer. She then related the conversation that she had with her daughter. The details of the alleged rape were related. She was permitted to testify that her daughter told her that she had been attacked. She then testified that her daughter said, "Mother, he did it to me."

It is proper to ask on cross examination whether the prosecuting witness made a complaint, and to receive in answer a simple yes or no. (*Stevens* v. *People*, 158 Ill. 111.) Her mother, however, was not asked whether her daughter had made complaint to her. In order to obtain the details that she related, she had asked her questions. A statement made, however, in response to questions is not admissible. (*Cunningham* v. *People*, 210 Ill. 410.)

Clearly, her testimony was hearsay evidence. It was incompetent. The trial court should have excluded all her testimony relative to the conversation that she had with her daughter, but it refused to do so.

The admission of such evidence was reversible error. It also constituted a denial of due process of law.

3. The sister of the prosecuting witness was not competent to testify.

At common law, in order to be a competent witness, a child must understand the nature and obligation of an oath or affirmation, and also the effect thereof. So it is said that the presumption that a child of tender years is not competent to testify may be rebutted by the disclosure of his knowledge of the nature and obligation of an oath

and of the moral and legal consequences resulting from its violation. If a child understands the nature and obligation of the oath, it is sufficient.

A witness who has reached the age of 14 years is presumed competent. If below that age the competency to testify is to be determined by a preliminary inquiry to advise the trial court, the requirement of competency being not one of age, but one of intelligence, ability to understand the meaning of an oath, and the moral obligations to speak the truth. (*Shannor* v. *Shannon*, 208 Ill. 52.) The question of competency is for the trial court to determine in the exercise of its sound discretion, (*People* v. *Enright*, 256 Ill. 221, *Hoch* v. *People*, 219 Ill. 265, *Kelly* v. *People*, 29 Ill. 287), and not for the jury.

The competency of a child to testify depends upon his or her intelligence, understanding and moral sense. (*Draper* v. *Draper*, 68 Ill. 17.) If the preliminary inquiry shows that the child does not understand the nature and obligation of an oath and is not of sufficient understanding to comprehend the thing about which she is called to testify, it is error to admit her testimony. (*People* v. *Johnson*, 298 Ill. 52, *People* v. *Karporich*, 288 Ill. 268, *Sokel* v. *People*, 212 Ill. 238.)

In the instant case, Darla Templeman, a sister of the prosecuting witness, was called as a witness by the People. She was only nine years old at the time of the alleged crime. Objection was made by petitioner to any testimony by her.

The preliminary inquiry by the trial court showed that such witness answered that she knew what it was to tell the truth, but she didn't know what would happen if she told a lie, although she was asked twice relative thereto,

that she attended Sunday School, and that it was bad if you tell something that is not the truth. It failed, however, to show that she understood the nature and obligation of an oath, or was of sufficient intelligence and understanding to testify. Although the court below observed that the intelligence of the witness was ascertained, to some extent, by her appearance and conduct in the presence of the trial court, the record fails to disclose any basis for this observation.

From a review of the preliminary inquiry and her testimony before the jury, it is clear that the trial court erred in permitting her to testify. The preliminary inquiry was not sufficient to establish her competency. It appears that her imagination overcame such intelligence and understanding as she had. She claimed that she saw a person hand a flashlight through the window to her sister who was in bed. She then claimed that she saw someone come into the house, but that she wasn't awake when the person walked into the bedroom. And lastly, she claimed that she saw the man when her sister held a flashlight in his face and that petitioner was the same man, but her sister failed to so testify. Although she was in the same bedroom, it is indeed strange that she did not relate anything about the alleged crime. Her testimony appears to have been highly colored by imagination and the natural tendency of a child to exaggerate. It seems certain that she was easily influenced by others who were interested in the case. She was not competent to testify. Her testimony was highly prejudicial to petitioner. It was a manifest abuse of discretion for the trial court to permit her to testify. Petitioner was denied due process of law.

4. The methods used to obtain the statement of petitioner were in violation of his Constitutional rights.

A statement or confession to be admissible in evidence must be voluntarily made. The question whether an alleged statement or confession was voluntarily made is essentially one for the trial judge, (*People* v. *Albers*, 360 Ill. 73, *People* v. *Fox*, 319 Ill. 606), and certain standards have been developed to guide him in reaching his decision. Where it is claimed that a statement or confession was not voluntarily made, the burden of proof is upon the People to show that it was obtained without the use of violence, threats, duress, coercion, intimidation or promises. (*People* v. *Holick*, 337 Ill. 333.) Under the usual procedure, the People, at a hearing out of the presence of the jury, must first establish a prima facie case by producing evidence that the statement or confession was voluntarily made. The burden of producing evidence then shifts to the defendant and the People may subsequently bring in evidence in rebuttal. (*People* v. *Bishop*, 359 Ill. 112.) Where the defendant has produced credible evidence tending to show that the statement or confession was the result of duress or coercion, the People, to rebut, must call for examination, if practicable, all persons present when the statement or confession was made so that the trial court may have all the facts surrounding the making of the statement or confession. (*People* v. *Arendarczyk*, 367 Ill. 534, *People* v. *Cope*, 345 Ill. 278.) These rules must be jealously guarded and strictly enforced because statements or confessions are sometimes extorted by brutal and ingenious means.

A statement or confession is not voluntarily made where any degree of influence amounting to duress is exerted by anyone having authority over the charge

against the accused or over his person tending to cause duress or hope of lenjency, for the law presumes that such statement or confession was prompted by that influence. A statement or confession so obtained must be excluded because the law cannot measure the force of the influence used or decide upon its effect upon the mind of the person. (*People* v. *Heide*, 302 Ill. 624, *Robinson* v. *People*, 159 Ill. 115, *Miller* v. *People*, 39 Ill. 457.)

In the instant case, a preliminary hearing was held before the trial court out of the presence of the jury. The People called Joe Ferona and Mike Iasparro, deputy sheriffs, who obtained the purported statement. Robert L. McDonald, an Assistant State's Attorney, who Ferona testified was present, was not called as a witness or his absence satisfactorily explained which was indeed strange. Petitioner testified.

The record discloses that in response to a telephone call from Hazel Templeman on September 18, 1955, such deputy sheriffs made an investigation of an alleged rape of her daughter, Anna Nadine Templeman. They talked with Mrs. Templeman and the other witnesses. In addition, they inspected the house where they lived.

On October 14, 1955, petitioner was taken into custody by such deputy sheriffs at the home of his sister. He was ready to eat supper. In response to a request, he went outside with them. He was sitting in the squad car talking with them at the time Elwyn Dorris, his brother-in-law, departed for his work. They then took him to the Templeman home which was several miles away to have them identify them. No other suspected persons accompanied them. They remained there 15 to 20 minutes talking with him. Leaving there, they took him to a factory. It was claimed that he was identified there by Erwin Leroy Pollitt. They then took him to the south side to investigate a

fire, but it was out when they arrived. He was finally taken to the Court House. While they drove around the city, they interrogated him. He said Ferona acted mysterious to him. He thought that Ferona was going to beat him up. Iasparro, however, calmed Ferona down.

It was 7:30 in the evening when they arrived at the Court House. He was questioned there by Ferona and Iasparro for a half hour. No members of his family were present. He was not represented by counsel. He asked for a lawyer, but he was denied one. Ferona said he wouldn't let him have a lawyer. He didn't advise petitioner that he didn't have to say a word because he wanted a statement from him. They didn't tell him that if he made a statement, it could be used against him in court. He was nervous, scared and hungry.

Ferona made a statement from a report that he had. He made it out. Petitioner did not know a thing about it. They promised him that if he would sign the statement he could go home and eat. He was not able to read or write. He wouldn't sign the statement but Ferona persisted. He then threatened to send the Sheriff into the room. He finally signed the statement but he couldn't understand it. He didn't know why he signed it. He was then taken to the County Jail. No warrant was served upon him.

He was taken to the State's Attorney's office on the following Monday. Ferona and Iasparro, however, were not with him. An Assistant State's Attorney showed him the statement. He was asked if it were true and he replied, No.

At the trial he moved to suppress the statement. His objections, however, were overruled. The statement was admitted in evidence and read to the jury.

There was not a sufficient showing made at the preliminary hearing as to the admissibility of the statement. The trial court should scrutinize with the utmost care the facts concerning a purported statement or confession to police officers and not deem itself bound by their testimony alone without taking into consideration all of the facts and circumstances surrounding it. (*People* v. *Thomlinson*, 400 Ill. 555.) The purported statement should have been supported by all persons present who heard or participated in the questioning. The People failed to sustain the burden of proof.

It is clear that the statement was not voluntarily made. It was obtained by secret, persistent and continued interrogation. Petitioner had little education. He was weak of will and mind. Ferona was determined to get a statement. "He wanted it," he said. In order to obtain it he completely disregarded the Constitutional rights of petitioner. Although there was no physical brutality, the statement was coerced. It was involuntary. (*Fikes* v. *Alabama*, 352 U.S. ....., *Haley* v. *Ohio*, 332 U.S. 596, *McNabb* v. *United States*, 318 U.S. 332.) The trial court should have excluded it from the jury. The use of the statement constituted a denial of due process of law.

5. The testimony of Erwin Leroy Pollitt in rebuttal was not admissible.

The People called Erwin Leroy Pollitt as a witness in rebuttal. Objection was made by petitioner, but it was overruled.

He claimed that he identified petitioner as the person he had seen peering through a window in the Templeman home on September 25, 1955, at 4:20 in the morning.

His testimony was not material to the issue. It was too remote. It was highly prejudicial to petitioner.

The trial court erred in the admission of such evidence. It also constituted a denial of due process of law.

6. There was no evidence to show force or resistance.

In order to prove the charge of forcible rape, there must be evidence to show that the act was committed by force and against the will of the female. If she has the use of her faculties and physical powers the evidence must show such resistance as will demonstrate that the act was against her will. (*People* v. *Meyers*, 381 Ill. 156, *People* v. *Eccarius*, 305 Ill. 62.) It is incumbent upon the People to prove such resistance beyond a reasonable doubt. It also is fundamental that voluntary submission by the female, while she has the power to resist, no matter how reluctantly yielded, amounts to consent and removes from the act an essential element of the crime of rape. It is not contended that the prosecuting witness did not have full and complete use of her faculties, and her physical powers do not appear to have been impaired. The evidence militates against any claim that she might have been overcome or paralyzed by fear. The rule that proof of physical force in rape is unnecessary if the prosecuting witness was paralyzed by fear or overcome by the superior strength of her attacker, has no application to the facts and circumstances revealed by the evidence in this case.

In the instant case, the prosecuting witness testified that she tried to fight but she did not describe anything that she did. She failed to make any struggle or outcry, nor was she bruised or struck. There was no showing of such resistance as demonstrates that the act was against her will.

Lord Hale once aptly said that an accusation of rape is easily made, hard to be proved, and still harder to be defended by one ever so innocent. (*People* v. *Freeman*, 244 Ill. 590.) It is for this reason that reviewing courts are especially charged with the duty to carefully examine the evidence in rape cases. (*People* v. *Kazmierczyk*, 357 Ill. 592.) It is further the duty of a reviewing court, where a verdict is returned by a jury in a criminal case or where a similar finding is made by a trial court where a jury has been waived, not only to consider the evidence but to reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the guilt of the defendant and is not sufficient to create an abiding conviction that he is guilty of the crime charged. (*People* v. *Scott*, 407 Ill. 301.)

The essential elements of the crime of forcible rape may not be presumed but it is incumbent upon the People to prove them beyond a reasonable doubt. Inasmuch as resistance was not proved beyond a reasonable doubt, petitioner was not proved guilty of the crime of forcible rape beyond a reasonable doubt. (*People* v. *Serrielle*, 354 Ill. 182.) The trial court should have allowed the motion for a directed verdict as to the first count of the indictment, at the close of the People's case. For the failure of the People to prove, beyond a reasonable doubt, the essential element of resistance, the court below should have reversed the judgment of conviction.

7. There was no evidence to show the age of petitioner.

Where a conviction of statutory rape is sought, to establish the corpus delicti, it is necessary that the evidence show, first, that the female was under the age of 16 years, second, that the male was over the age of 17 years, and third, that sexual intercourse occurred between them.

It is elementary that the corpus delicti cannot be proved by the statement or confession of the defendant alone. (*Wistrand* v. *People*, 213 Ill. 72, *Gore* v. *People*, 162 Ill. 259, *Williams* v. *People*, 101 Ill. 382, *May* v. *People*, 92 Ill. 343.) Unless petitioner was above the age of 17 years at the time of the alleged commission of the crime, there was no violation of the statute. It was as essential to prove his age as it was to establish the age of the female, or to show that sexual intercourse occurred. Either of the three elements lacking, the corpus delicti is not established. Consequently, there must be evidence tending to establish each of these three elements aside from the statement of petitioner. So far as his age was concerned, there was no evidence of it except in his purported statement which contained a recital that he was 28 years old. His age was not otherwise proven except that an officer testified that he appeared to be 28. There was, however, no foundation laid for his opinion. It follows, therefore, that a crime had not been committed because if he was not above the age of 17 years, no crime was committed.

Petitioner was on the witness stand at the preliminary hearing as to the admissibility of the statement, but the jury was excluded from the court room while he testified. But whether he did or did not testify, the law does not allow the jury to fix his age by inspecting his person. (*Stephenson* v. *State*, 28 Ind. 272.) While his appearance might be conclusive evidence to the jury, there would be difficulty in having evidence of that character preserved in the bill of exceptions or report of proceedings for the inspection of a reviewing court. To allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust. (*Scaverns* v. *Lischinski*, 181 Ill. 356.)

In *Wistrand* v. *People*, 213 Ill. 72, the age of the defendant was material, and it was held that the jury could not determine his age by inspecting his person during the trial, but it was said that for the purpose of fixing his age, "persons who had seen him would have been competent to testify relative to his appearance, and such testimony would have been proper for the consideration of the jury on the question of age." This is not a holding that a witness may, in the first instance, express his opinion as to age from such appearance. Where testimony of this kind is material the witness should first describe the appearance of the individual whose age is in question, and then state his opinion relative to the age of the person, based upon the appearance of that person as he had already described it. (*People* v. *Davidson*, 240 Ill. 191.) The People, however, failed to pursue the proper method to obtain the opinion of the witness.

The age of petitioner which was an essential element of the corpus delicti was not proved. (*People* v. *Rogers*, 415 Ill. 343, *People* v. *Wilson*, 401 Ill. 68, *People* v. *Davidson*, 240 Ill. 191.) Inasmuch as his age was not proved beyond a reasonable doubt, petitioner was not proved guilty of the crime of statutory rape beyond a reasonable doubt. The trial court should have allowed the motion for a directed verdict as to the second count of the indictment, at the close of the People's case. For the failure of the People to prove, beyond a reasonable doubt, the age of petitioner, the court below should have reversed the judgment of conviction.

8. There was no evidence of the identity of petitioner.

Mrs. Templeman testified that the person seemed quite tall, in the neighborhood of 6 feet, but she couldn't say his exact height. She could see his height but not his

face because she wasn't close enough to him. She didn't know how old the person was or how he was dressed. The only time she had seen petitioner at her home that she could identify him was on October 14, 1955.

The prosecuting witness testified that she heard the voice of petitioner on October 14, 1955, that it was the same voice, then that it sounded like the same voice, and lastly, that it was the same voice that she heard on September 18, 1955. She also testified that the height and profile were similar. On cross examination she testified that she didn't know who it was in the bedroom because she couldn't see him.

Darla Templeman, a sister, testified that she saw the man when her sister held a flashlight in his face and that petitioner was the same man, but her sister failed to so testify. She didn't hear the voice of the man that was there that night, she just saw him. She wasn't awake when the person walked into the bedroom. It was when she was awakened, she claimed, by conversation, that she saw a person sitting on the bed. She didn't tell petitioner, however, while he was in the house with the deputy sheriffs, that she had seen him before. As heretofore shown, she was not competent to testify.

This was in substance the only testimony relative to the identity of petitioner. It was not positive or definite. It leaves a reasonable doubt that petitioner was the person who committed the crime charged in the indictment. It was not sufficient to sustain the judgment of conviction. Not only was the verdict against the manifest weight of the evidence, but the evidence was so doubtful, improbable and unsatisfactory as to raise a reasonable doubt of the guilt of petitioner. The court below should have reversed the judgment of conviction.

9. The testimony of the prosecuting witness was not clear and convincing.

In a rape case, where the charge is denied, in order to sustain a conviction, unless the evidence is clear and convincing, the testimony of the prosecuting witness must be corroborated by other facts and circumstances in evidence. (*People* v. *Williams*, 414 Ill. 414, *People* v. *Silva*, 405 Ill. 158.) Where the injured female testified to the commission of the rape, evidence of complaint by her soon after the occurrence, or at the first opportunity, is competent, not to prove the commission of the act, but to corroborate her testimony. (*People* v. *Carruthers*, 379 Ill. 388.)

In the instant case, the prosecuting witness did not testify that she made complaint to anyone. Her mother, however, was asked to relate what her daughter told her on September 18, 1955. Objection was made by petitioner, but the trial court permitted her to testify. As heretofore shown, this was hearsay evidence. It was incompetent. Darla, a sister, claimed to identify petitioner but, as heretofore shown, she was not competent to testify. There was absolutely nothing to corroborate the testimony of the prosecuting witness.

The failure of the prosecuting witness to attempt to escape, to make any struggle or outcry, or to identify petitioner, is inconceivable. There is no suggestion in the evidence that the act was accompanied by force. Her testimony was not of that clear and convincing character that is required to support the judgment of conviction. Justice demands that petitioner be given a new trial.

The case against petitioner was so inconclusive that it was the duty of the court below to reverse the judgment of conviction. It simply cannot stand.

10. In his argument the State's Attorney made improper remarks to the jury.

It is the duty of the State's Attorney to see that every accused person has a fair and impartial trial. He is required to treat the defendant fairly in his argument as well as to produce only competent evidence during the trial. (*People* v. *Black*, 317 Ill. 603.)

The scope and extent of the arguments are subject to the control of the trial court in the exercise of a sound discretion, which, particularly in cases involving the rights and liberty of an accused must be carefully and cautiously exercised.

It is error for the State's Attorney to make remarks outside the record which are injurious to the accused, in that they prejudice the minds of the jury against him. He must not make remarks which appeal to, and tend to inflame or excite the minds of the jury against the accused.

The remarks of the State's Attorney which consist of personal abuse or vilification of the accused, and which tend to arouse or inflame the passion and prejudice of the jury against him, are error, where they are not based upon any facts in evidence. (*O'Donnell* v. *People*, 110 Ill. App. 250, aff. 211 Ill. 158, *Earll* v. *People*, 99 Ill. 123.)

In the instant case, the State's Attorney used language tending to inflame and excite the minds of the jury against the petitioner. He also used language tending to coerce the jury into a verdict of guilty.

In a case like this, where there is reason to fear that the verdict was not the result of fair, impartial and dispassionate consideration of all the evidence, such argument becomes material and substantial error. There is

no instrument that can be used to measure and determine the effect of inflammatory remarks upon the minds of the jury. If the effect could be measured and determined, there is no eraser available to the trial court to erase it. *People* v. *Maria*, 359 Ill. 231.) The court below has severly condemned inflammatory and intemperate remarks of State's Attorneys who have overstepped the bounds of fact and propriety in their closing arguments to the jury. (*People* v. *Weitzman*, 362 Ill. 11.)

It is clear that the jury was influenced by the improper remarks of the State's Attorney. They were highly prejudicial to petitioner. The objections to the argument should have been sustained. The State's Attorney should have been promptly rebuked and such measures taken by the trial court as would effectually prevent any repetition of such conduct. The prejudicial and inflammatory argument of the State's Attorney required that the court below reverse the judgment of conviction.

The right to a fair trial is the greatest human right that an accused has. Petitioner was denied a fair trial by an impartial jury. This constituted a denial of due process of law.

11. Erroneous instructions tendered by the People were given to the jury.

Instruction No. 6 relative to the falso in uno rule should not have been given.

The record fails to disclose any instruction which apprises the jury of what are, or are not, the material facts, or defines the essential elements of the crimes with which petitioner was charged. The instruction which quoted part of the statute was not a sufficient definition of the essential elements. There was no instruction which advised the jury as to what constituted statutory rape.

This form of instruction has been repeatedly condemned by the court below. It was reversible error to give the instruction. (*People* v. *DeMarios*, 401 Ill. 146, *People* v. *Scott*, 401 Ill. 80, *People* v. *Arcabascio*, 395 Ill. 487, *People* v. *Wells*, 380 Ill. 347, *People* v. *Flynn*, 378 Ill. 351.)

The instruction was indeed pernicious. The court below should have reversed the judgment of conviction because of the instruction alone. It cannot be ignored by this court.

Instruction No. 19 relative to circumstantial evidence should not have been given.

It was not applicable to the case.

Although all the evidence in the case tending to show the guilt of the defendant was direct evidence, the trial court gave the instruction relative to circumstantial evidence. The giving of the instruction was tantamount to telling the jury that there was circumstantial evidence in the case sufficient to warrant a conviction. (*People* v. *Braidman*, 323 Ill., 37.) Considering the state of the evidence, the error in giving the instruction is of too grave a character to be able to say that petitioner was not prejudiced by it. (*People* v. *Ambach*, 247 Ill. 451.)

It was reversible error to give the instruction. (*Kevern* v. *People*, 224 Ill. 170, *Cunningham* v. *People*, 210 Ill. 410.)

Instruction No. 28 relative to the defense of alibi should not have been given.

It was not applicable to the case.

In *People* v. *Braidman*, 323 Ill. 37, it was said that the giving of a similar instruction, under the state of the proof, might well be taken by the jury as an intimation by the court that there was some question as to the sufficiency of the alibi, other than the question of credibility of the witnesses.

In *People* v. *Reno*, 324 Ill. 484, the defendant was the only one to testify to an alibi and a similar instruction was the only one given on the question of alibi. The case was distinguished from *People* v. *Schladweiler*, 315 Ill. 553, which held that the instruction was an abstract proposition of law which was not applicable to the facts.

In *People* v. *Frugoli*, 334 Ill. 324, the instruction was deemed correct as an abstract proposition of law, but it was not applicable to the case and under the evidence was held to be reversible error.

The instruction was condemned in *People* v. *Lacey*, 339 Ill. 480, because the testimony of the alibi witnesses covered the entire time. The *Braidman*, *Reno* and *Frugoli* cases were followed.

The instruction was held to be properly given in *People* v. *Terracco*, 346 Ill. 423, but the court cited *People* v. *Lacey* with approval, and said "Whether this instruction is correct or erroneous depends upon the facts in the particular case."

While the instruction has been held in several cases including *People* v. *Schladweiler*, to be proper where the evidence warrants it, yet where, as in the instant case, the evidence of the alibi witnesses covered the entire time, it was reversible error to give it.

12. The trial court erred in entering judgment of conviction on the verdict of the jury and in imposing sentence.

The indictment consisted of three counts. The first count alleged forcible rape. The second count alleged statutory rape. The third count alleged assault with the intent to commit rape.

The jury found the defendant guilty of rape in manner and form as charged in the first and second counts of the indictment and fixed his punishment at imprisonment in the penitentiary for a term of 15 years. No verdict, however, was returned as to the third count.

In forcible rape, the act must be shown to have been committed by force and against the will of the female. In statutory rape, it is immaterial whether it was with her consent or against her will. (*People* v. *Sassano*, 323 Ill. 182.) The verdict was inconsistent.

The failure to return a verdict as to the third count is equivalent to a finding of not guilty. The verdict of guilty as to the first and second counts is inconsistent with the implied acquital as to the third count. There can be no rape without an assault with intent to commit rape.

Where an indictment charges separate and distinct offenses in separate counts, the jury should pass upon each count separately applying to it the evidence bearing on the guilt of the defendant of the crime charged. The jury should have returned a separate verdict as to each count of the indictment but it failed to do so.

The jury fixed the punishment under two counts of the indictment. It should have been fixed under each count in separate verdicts.

The verdict is so defective that judgment of conviction could not be legally entered thereon.

Petitioner was sentenced to the pententiary but the trial court failed to fix a definite term of imprisonment. The sentence is uncertain and indefinite.

The judgment of conviction and sentence is void.

Conclusion.

This case involves a substantial federal question. Important principles of constitutional law were overlooked or misapprehended by the courts below. Petitioner was denied a fair and impartial trial. Illinois has deprived him of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. There has been a most flagrant and unwarranted violation of his Constitutional rights. This court should take jurisdiction in order that justice may be done. It is the last hope of an innocent man.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,

Counsel for Petitioner.

APPENDIX.

A.

Statute.

An Act to review the law in relation to change of venue.

Section 18. When any defendant in an indictment or information in any court in this state shall fear that he will not receive a fair and impartial trial in the court in which the case is pending, because the judge of the court is, or the inhabitants of the county in which the case is pending are prejudiced against him, or the attorney representing him, the court shall award a change of venue upon the application of the defendant as hereinafter provided.

Section 20. Every application for a change of venue shall be by petition setting forth the cause for the application and praying a change of venue, which petition shall be verified by the affidavit of the defendant.

Section 21. When the cause for a change of venue is the prejudice of the judge or any two of them against the defendant or his attorney, the petition shall be accompanied by the affidavit of the defendant or his attorney, stating that he believes the judge, or any two of them, as the case may be, are so prejudiced against the applicant or his attorney, that either cannot have a fair and impartial trial, and thereupon the case may be tried by any other of the circuit judges of the circuit in which the case is pending, and the venue shall not be changed from the county in which the indictment is found or the information is filed, in such case.

(Appendix)

Section 23. The application may be made to the court in which the case is pending, or to the judge thereof in vacation, reasonable notice of the application having been given to the State's Attorney.

Section 24. No application for a change of venue made more than thirty days after the earliest day at which the applicant might have been heard shall be allowed unless the applicant shall have given to the State's Attorney at least ten days previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than ten days before the making of the application.

Section 25. No change of venue shall be granted more than thirty days after the earliest day at which the applicant might have been heard unless he shall show that the causes for which a change of venue is asked have arisen or come to his knowledge since the expiration of such thirty days.

Approved March 25, 1874.

Ill. Rev. Stat. 1955, Chap. 146.

B.

Opinion.

Mr. Justice Davis delivered the opinion of the court:

James Dayis, defendant, was indicted in the circuit court of Winnebago County for the crimes of forcible rape, statutory rape, and assault with intent to commit rape, alleged to have been committed on September 18, 1955, upon a 14-year-old girl. He entered a plea of not guilty; the case was tried before a jury which found him guilty of forcible rape, in the manner and form as charged in count I, and guilty of statutory rape, as charged in count II of the indictment, and fixed his punishment at imprisonment in the penitentiary for 15 years. No verdict was returned as to the third count of the indictment which charged assault with intent to commit rape. Post-trial motions were overruled, and the defendant was sentenced on the jury's verdict. He now brings this writ of error to review the judgment of conviction and sentence.

The defendant assigned the following errors for reversal of the judgment: (1) denial of application for change of venue; (2) the admission of evidence; (3) the evidence failed to prove the guilt of defendant beyond a reasonable doubt; (4) improper argument by State's Attorney; (5) the giving and refusing of certain instructions; and (6) error in entering judgment of conviction on the verdict of the jury and in imposing sentence.

Defendant first contends that the court erred in denying his application for change of venue. He was indicted by the grand jury and *capias* issued for his arrest on January 9, 1956. On January 11, 1956, the defendant appeared in court with his attorney, and after being arraigned,

made a motion to quash the indictment which motion was heard and denied. Defendant then entered a plea of not guilty to the indictment and the court set the case for trial on February 13, 1956, but it was not reached. On the following day, the defendant filed a petition for change of venue from Judges O'Sullivan and Dusher, on the ground of prejudice. The verified petition, not accompanied by supporting affidavit, averred that "such cause for a change of venue arose and came to his knowledge heretofore and again on February 13, 1956."

The Venue Act, (Ill. Rev. Stat. 1955, chap. 146,) contains the requirements and provides the procedure to be followed in connection with a change of venue. The specific provisions of certain sections of this act are subsequently outlined. Section 18 provides that when any defendant in an indictment or information fears that he will not receive a fair and impartial trial in the court in which the case is pending because the judge is, or the inhabitants of the county are, prejudiced against him, the court shall award a change of venue upon the application of the defendant, provided the application is in conformity with subsequent sections of the act. Section 20 provides that every such application shall be by petition setting forth the cause of the application and praying a change of venue, and that the petition shall be verified by the affidavit of the defendant. Section 21 provides that when the cause for change of venue is the prejudice of the judge against the defendant or his attorney, the petition shall be accompanied by the affidavit of the defendant or his attorney, stating that he believes the judge is so prejudiced against the applicant or his attorney that either cannot have a fair and impartial trial. Section 24 provides that no application for change of venue made more than 30 days after the earliest day at which the applicant might have been heard

shall be allowed unless the applicant shall have given to the State's Attorney at east 10 days' previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than 10 days before making the application. Section 25 provides that no change of venue shall be granted more than 30 days after the earliest day at which the applicant might have been heard unless he shall show that the causes for which a change is asked have arisen or come to his knowledge since the expiration of such 30 days.

In a criminal case, if the petition for change of venue on account of the prejudice of the judge, and the accompanying affidavit, are in compliance with the act, the right of the defendant to a change of venue is absolute. Under such circumstances the trial judge loses all power and authority over the case except to make the necessary order to effectuate the change; and the denial of the petition constitutes reversible error. *People* v. *Rosenbaum*, 299 Ill. 93; *People* v. *Cohen*, 268 Ill. 416; *Cantwell* v. *People*, 138 Ill. 602.

The petition was not accompanied by an affidavit of defendant or his attorney, and we question whether it was filed in apt time. However, we need not determine whether it met with the technical requirements of the statute. In colloquy relative to change of venue, between the trial court, the attorney for defendant, and the State's Attorney, and in the presence of the defendant, the attorney for the defendant stated: "I understand your Honor is going to be here next month; Judge Dusher is not going to be here. I would say this, if the Court would remove this case from the trial list at the present time and not pass on the petition, it could be set for trial before you next month. I understand there is to be a jury". In view of this statement we conclude that the allegation of prejudice was without

foundation; that the petition was filed for the purpose of delay; that the alleged prejudice of the trial judge was waived; and that the trial court properly denied the petition for change of venue.

Defendant next contends that the trial court erred in the admission of evidence. He first urges that the comments of the complaining witness made immediately after the alleged offense were not admissible. The mother of the complaining witness testified on direct examination that she was awakened by her 9-year old daughter about 2:30 or 3:00 o'clock on the morning of September 18, 1955; that she went into the kitchen, turned on the light, and saw a man standing beside complaining witness's bed in the adjoining bedroom; that she could see his height but not his face because there was no light in the bedroom and she wasn't close enough to him; that he was in the neighborhood of six feet tall; that he told her to get back in her room if she knew what was good for her; that she went back to her bedroom to awaken her husband and then heard the person leave the house by the kitchen door. She further testified that, after telephoning for the sheriff, she talked to her 14-year-old daughter, the complaining witness; that said daughter was hysterical and there wasn't much she could get out of her; and that the complaining witness said, "Mother, he threatened to kill me." The mother also testified that the complaining witness told her that defendant also threatened to kill Billy; that he said he would cut her guts out if she didn't lay down and shut up; that he said if she didn't do what he wanted to do he would kill her; and that complaining witness said, "Mother, he did it to me."

In rape cases, where the injured female is a witness, it is proper for her to testify that she made prompt complaint concerning the outrage which had been perpetrated

upon her, and it is proper to permit the person to whom she complained to give testimony that the complaint was made, but it is not proper for such person to give the name of the accused or the details of the offense. We believe that the testimony of the mother was within the limitations prescribed by law. The details of the offense were not related by her. The declarations preceding the words, "Mother, he did it to me" were merely introductory. Evidence of such complaint is admitted on the theory that the natural instinct of a female thus outraged prompts her to express her indignation at the injury inflicted upon her, and it is deemed relevant on the ground that it corroborates her statement that she was assaulted. (*People* v. *Romano,* 306 Ill. 502; *Stevens* v. *People,* 158 Ill. 111.) To be admissible the complaint of the offense must be made, as it was in this case, without inconsistent or unexplained delay and must be spontaneous declaration of injury, and not the mere recital of past events made in answer to questions. (*Cunningham* v. *People,* 210 Ill. 410.) The admission of such complaint is an exception to the general rule that hearsay evidence is not admissible and does not extend to crimes other than rape. *People* v. *Romano,* 306 Ill. 502; *Stevens* v. *People,* 158 Ill. 111.

Defendant also urges that the sister of the complaining witness, an eyewitness to the event, should not have been permitted to testify in that preliminary inquiry was not sufficient to establish her competency. At the time of the offense, the sister was 9 years old; at the time of trial she was 10 years old and in the fourth grade. We are unable to agree that it was error to permit her to testify. She was subjected to an examination by the court to determine her competency; the court found that the child had sufficient mental perception and moral understanding to qualify her to speak as a witness. If the witness was sufficiently

nature to receive correct impressions by her senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth, she was competent. Not age, but the degree of intelligence of a child, determines the question of the child's competency. (*Shannon* v. *Swanson*, 208 Ill. 52; *State* v. *Segerberg*, 131 Conn. 546, 41 A.2d 101.) In the case at bar the intelligence of the witness was ascertained, to some extent, by her appearance and conduct in the presence of the court, and it is only where there has been an abuse of discretion or a manifest misapprehension of some legal principle that a decision to admit such testimony will be reviewed. (*People* v. *Karpovich*, 288 Ill. 268.) We find no reason to disturb the court's determination that the witness was competent.

At the trial a statement in writing in narrative form, signed by the defendant, was offered in evidence as People's exhibit No. 1. The defendant objected to its introduction on the ground that the statement was not voluntary. A preliminary hearing on this issue was had before the court out of the presence of the jury. Joe Ferona, a witness for the People, testified that on October 14, 1955, approximately an hour-and-a-half after being taken into custody, the defendant was questioned by the witness and another deputy sheriff at the sheriff's office; that approximately one-half hour thereafter the witness typed People's exhibit No. 1 from statements made to him by defendant; and that the defendant immediately read and signed it. In substance, the statement sets forth that the defendant was 28 years of age; that on the morning of September 18 he entered the complaining witness's home in Rockford at about 4:00 A.M.; that a young girl let him in; that he told her to go to bed; that he got on top of her but had nothing to do with her sexually; that he left by the rear

door of the house; and that no threats or promises were made to defendant and no acts of violence done him in connection with the giving of the statement.

On cross-examination Ferona testified that he and deputy sheriff Mike Iasparro, picked up defendant at about 6:45 P.M. at the house of defendant's sister; that they drove him first to the complaining witness's home, then to the Atwood factory to be viewed by a prospective witness, and then to the sheriff's office; that about 8:15 P.M. or twenty minutes after the three arrived at the sheriff's office, the defendant made the statement, and that the defendant, deputy sheriff Mike Iasparro, and Robert L. McDonald, an assistant State's Attorney, were present.

Mike Iasparro was called as a witness on behalf of the People. His testimony on direct examination corroborated that of witness Ferona. On cross-examination he testified that defendant was told he could have a lawyer, and that defendant didn't appear to be too nervous.

Defendant, on direct examination, testified that he was at his sister's home eating supper when the officers arrived on October 14; that he was taken by the deputies to the complaining witness's home and the Atwood factory, and was questioned by the officers during this time; that after they reached the court house the two officers questioned him for at least half an hour; that he was nervous and scared; that the officers promised that if he would sign a statement, he could go home to his wife and eat supper; and that he had eighth grade education and was unable to read or write. While a witness he was presented with the statement in question and asked to read it, and the record indicates that he read the introductory portion of the statement well. It also appears that after reading approximately one third of the body of the statement he

apparently remembered that he had testified that he was unable to read. Thereafter, he read in a halting, stumbling and confused manner. It is our conclusion that the defendant could read the statement. In response to a question regarding a request for a lawyer he said he did ask for one but that the two deputy sheriffs told him the lawyers were "all out of town."

Confessions are competent evidence only when they are voluntarily made. (*People* v. *Wagoner*, 8 Ill. 2d 188; *People* v. *Sweeney*, 304 Ill. 502.) A confession need not be spontaneous, nor is it necessary that it proceed wholly at the suggestion of the accused. It may be set in motion by external causes so long as such influences are not what the law deems improper. A confession is not rendered inadmissible by the mere fact that it was elicited by questions put by police officers or others, or by the fact that an exhortation to tell the truth produced it, (*People* v. *Vinci*, 295 Ill. 419,) nor does the fact that the prisoner was not warned that the confession might be used against him render it incompetent. *People* v. *Fox*, 319 Ill. 606; *Wilson* v. *United States*, 162 U.S. 613.

Defendant contends that the statement in question should have been supported by the testimony of all persons present who heard or participated in the questioning. Where there is evidence of improper conduct in obtaining an alleged confession, the People are required, if feasible, to produce all persons having any authority or control over the defendant, and to show all circumstances surrounding the taking of the confession; and the court may exclude such confession unless all parties present in connection with its taking are called as witnesses. (*People* v. *Waggoner*, 8 Ill. 2d 188; *People* v. *Ickes*, 370 Ill. 486.) However, in the case at bar, we find no evidence of improper conduct in obtaining the alleged confession. It was signed within

two hours after the defendant was taken into custody. There was no long or unreasonable interrogation. There is no claim of violence, threats of harm, duress, coercion, or abuse, or that there was an offer or promise of leniency. We cannot regard the promise, that defendant might go home to his wife and eat supper if he signed the confession, to be such as would exercise influence over his mind and induce him to confess to a criminal offense which he did not commit. We find no evidence of improper conduct in obtaining the confession and believe that the People established this by the testimony of the deputy sheriffs. However, as stated in *People* v. *Fox*, 319 Ill. 606, 617, "The order of proof is largely within the discretion of the trial judge. While the burden of showing that no improper inducement existed when the confession was made is upon the prosecution, it is not necessary for the prosecution to produce all its evidence before any evidence is produced on behalf of the accused. After the State has made a *prima facie* case, then the burden of going forward with the proof properly shifts to the accused. [Citation.] After the accused has made his case, the prosecution may produce evidence in rebuttal to meet that offered against the competency of the confession. In order to meet its burden of showing the confession to be voluntary, the prosecution must show by its witnesses the circumstances under which the confession was made, with sufficient detail to enable the court to determine the question." Since the defendant offered no evidence of improper conduct in obtaining the alleged confession, the trial court did not err in admitting it in evidence without the testimony of the Assistant State's Attorney, who was likewise present when it was taken.

The defendant contends that the testimony of Erwin Le Roy Pollett, introduced in rebuttal, was too remote and

therefore not admissible. Defendant took the stand in his own defense and testified, in support of his alibi, that prior to October 14, 1955, he had never, at any time, gone to the home of the complaining witness, nor been on the street where she lived. The testimony of Pollet was introduced to establish that he had seen the defendant peering into the window of complaining witness's home one week after the crime was committed. It was given to rebut the direct evidence given by the defendant, and was clearly admissible for that purpose.

The defendant further contends the evidence failed to prove his guilt beyond a reasonable doubt, and that there was no evidence to show force or resistance. This contention cannot stand in the light of the facts in this case. The complaining witness was a 14-year-old girl peacefully sleeping in her home with her brothers and sisters. The defendant entered her home in the night time. He had no acquaintanceship with this family, and could have had no lawful purpose in entering the home. The record shows that he went into the bedroom and forcibly had sexual intercourse with the girl against her will; that he threatened he would cut her guts out if she didn't lay down and shut up, and said that if she didn't do what he wanted to he would kill her; and that he forcibly pulled off her pajama bottoms. The complaining witness testified that she tried to fight, but he threatened her with some object in his hand and threatened to kill both her and her brother, and that she was scared. After considering all the facts and circumstances in evidence, the jury determined, and we believe properly, that the acts were against her will. (*People* v. *Fearing*, 365 Ill. 62; *Austine* v. *People*, 110 Ill. 248,) and that the defendant was guilty beyond a reasonable doubt of forcible and statutory rape.

(Opinion)

The defendant urges that his age was not proved. To establish the *corpus delecti* in statutory rape, it is necessary that the proof should show that the female was under the age of 16; that the male was over the age of 17; and that sexual intercourse occurred between them. To establish the *corpus delecti* in forcible rape, it is necessary that the proof show that a male person of the age of 14 years and upwards had carnal knowledge of a female forcibly and against her will. The defendant, in his signed statement admitted into evidence as People's exhibit No. 1, stated that he was 28 years of age, married, and that he was living with his wife. Later he testified that he was 28 years of age and had been employed in a local factory for eight years. Without objection on the part of defendant, the deputy sheriff, Mike Iasparro, testified that the defendant had said he was 28 years old; and that he appeared to be that age. In the absence of specific objection, it was proper to permit this witness to give his opinion as to defendant's age. (*People* v. *Claussen,* 367 Ill. 430.) Anna Catherine Davis, mother of defendant, was called as a witness in his behalf, and she testified on direct examination that he was 28 years of age. The record clearly shows that the defendant was over the required age.

The defendant also contends that there was no evidence which identified him as the person who committed the crimes charged in the indictment. The testimony of one credible witness, if positive, is sufficient to convict even though contradicted by the accused. Where it is corroborated by other evidence, it is clearly adequate to justify a conviction. (*People* v. *Sproch,* 409 Ill. 55; *People* v. *Thompson,* 406 Ill. 555.) In the present case, the defendant in his statement admitted being in the complaining witness's home at the time of the assault. He was positively identified by one witness who saw the offense committed.

Two other witnesses identified the defendant by height, profile and voice. We find no merit in this contention.

The defendant also argues that the testimony of the prosecuting witness was not clear and convincing, and that unless such testimony is clear and convincing, it must be corroborated by other facts and circumstances in order to sustain a conviction. (*People* v. *Silva*, 405 Ill. 158; *People* v. *Williams*, 414 Ill. 414.) However, in the instant case the testimony of the prosecuting witness was clear and convincing, and, in addition, she was corroborated by the testimony of her sister as to the events leading up to and at the time of the offense. The testimony of her mother, and the admissions contained in the statement of defendant were likewise corroborative of her testimony. Dr. Roberts, the examining physician, testified that he found her hymen torn in two places and bleeding; that he found sperm cells from the testes of a male within her vagina; that no old or other tears were found in the hymen; and that it was his belief that this was the first time her vagina had been entered. These circumstances are mute, corroborative evidence to support her testimony. Standing against this positive evidence is the defense of an alibi. On such a record we will not substitute our judgment for that of the jury that heard and saw the witnesses, unless it can be said that it is palpably contrary to the weight of the evidence, or is so unsatisfactory as to justify a reasonable doubt of defendant's guilt. (*People* v. *Ortega*, 5 Ill. 2d 79; *People* v. *Harris*, 391 Ill. 358; *People* v. *Canonica*, 370 Ill. 441.) The mere fact that the evidence is conflicting will not justify reversal. *People* v. *Meyers*, 412 Ill. 136; *People* v. *Hinderhan*, 405 Ill. 435.

As a further ground for reversal, the defendant contends that the trial court committed error in giving and

refusing to give certain instructions. The People tendered 34 instructions of which 32 were given, while defendant tendered 27, of which 22 were given. We have considered them, but find no prejudicial error. However, error in the giving or refusing of instructions will not, alone, justify a reversal when the evidence of the defendant's guilt is so clear and convincing, as it was in the case at bar, that a jury could not reasonably have found the defendant not guilty. (*People* v. *McCurrie*, 337 Ill. 290.) After considering the 61 instructions tendered in this case, we cannot but quote the pertinent observations which we made in *People* v. *Burns*, 300 Ill. 361, at page 365: "Counsel have little room to complain of error in instructions where they burden the trial court with the labor of weeding out a lot of miscellaneous stock instructions in the short time available for this task of the court."

The defendant has also charged that the court erred in permitting improper argument by the State's Attorney. No specific objection, however, is assigned. We have considered the general propositions cited by the defendant and have read the argument as presented in the record, but we find no reversible error in this respect.

The defendant has also argued that the court erred in entering judgment of conviction on the verdict of the jury and in imposing sentence. The indictment consisted of three counts, as heretofore outlined. The jury found the defendant guilty of both statutory and forcible rape. The evidence supports these verdicts. The defendant urges that the verdict is inconsistent. We cannot agree. In forcible rape the act must be shown to have been against the will of the female. In statutory rape, it is immaterial whether it is with her consent or against her will. In the case at bar the jury was warranted from the evidence in finding the act against the will of the complaining witness under

the charges of both forcible and statutory rape. Moreover, a conviction of rape is a conviction of assault to commit rape. (*People* v. *Ristau*, 363 Ill. 583.) Failure to return a verdict as to the charge of assault with intent to commit rape does not constitute reversible error. The lesser offense is included in the greater. The jury sets the penalty in rape cases. There was one rape involved and the jury set only one penalty even though the act constituted both forcible and statutory rape. The verdict was proper and the judgment entered thereon is valid.

"It is not the purpose of a court of review to determine whether or not a record is free from error, but rather to determine whether or not the accused has had a fair trial under the law and whether his conviction is based upon evidence establishing his guilt beyond a reasonable doubt." *People* v. *Stavrakas*, 355 Ill. 570, 583.

We conclude from the record that the defendant had a fair trial; that the errors assigned could not reasonably have affected the result of the trial; and that the judgment of the trial court should be affirmed.

The judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.